

Serial: 242359

IN THE SUPREME COURT OF MISSISSIPPI

No. 2017-DR-00696-SCT

STEPHEN ELLIOT POWERS

Petitioner

v.

STATE OF MISSISSIPPI

Respondent

CORRECTED EN BANC ORDER

Before the en banc Court are (1) Stephen Elliot Powers's Motion to Hold Post-Conviction Proceedings in Abeyance Because of Petitioner's Incompetency and (2) his Motion to Amend Petitioner's Motion to Hold in Abeyance Because of Petitioner's Incompetency. The State's responses in opposition to both motions are also before us.

On January 4, 2022, Powers filed his First Successor Petition for Post-Conviction Relief. In the abeyance motion, he asks this Court "to hold his post-conviction proceedings in abeyance because of his lack of competency-including his lack of a rational and factual understanding of the proceedings as well as his inability to communicate rationally with counsel about his case."

We are persuaded by the State's argument that Powers has no right to competency in post-conviction proceedings. See **Ryan v. Gonzales**, 568 U.S. 57, 64-65, 133 S. Ct. 696, 702-03, 184 L. Ed. 2d 528 (2013) (stating that the Sixth Amendment right to counsel does not imply a right to competence and holding that death-row inmates seeking federal habeas relief have no statutory right to stay proceedings when found incompetent). To be sure, **Neal v. State**, 687 So. 2d 1180, 1183 (Miss. 1996) (citing **Rumbaugh v. Procunier**, 753 F.2d 395 (5th Cir. 1985)), said that defendants "must be competent at all stages of the criminal process," including post-conviction proceedings. But **Rumbaugh**

concerned competency to waive the right to collateral review of a conviction and sentence, not whether there is a constitutional or statutory right to competency during post-conviction proceedings. 753 F.2d at 398; *Dickerson v. State*, 291 So. 3d 344, 354-55 (Miss. 2020) (Coleman, J., specially concurring).

Even though we are persuaded by the State’s argument, we still reserve discretionary authority to grant a stay. See *Ryan*, 568 U.S. at 74. Here, Powers argues that his input is critical because his ineffective-assistance-of-counsel claims are “intensely fact-bound” and trial counsel is deceased. But he also says his “health and cognitive impairments have no chance to be rehabilitated.” And in federal habeas proceedings, “[w]here there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State’s attempts to defend its presumptively valid judgment.” *Id.* at 77.

After due consideration, we find that the abeyance motion should be denied.

In his motion to amend, Powers seeks not only to amend his abeyance motion, but also asks the Court “to stay his execution because of his mental health deficits and other combined psychological shortfalls which have diminished his rational understanding of the punishment imposed on him.” And he requests a hearing to determine if he satisfies *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986); *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d (2007); and *Madison v. Alabama*, 139 S. Ct. 718, 203 L. Ed. 2d 103 (2019).

After due consideration, we find that Powers’s request to stay his execution is premature and that the motion to amend should be denied without prejudice to his right to seek a stay of execution at the proper time.

IT IS, THEREFORE, ORDERED that Powers’s Motion to Hold Post-Conviction Proceedings in Abeyance Because of Petitioner’s Incompetency is denied.

IT IS FURTHER ORDERED that his Motion to Amend Petitioner’s Motion to Hold in Abeyance Because of Petitioner’s Incompetency is denied without prejudice to

his right to seek a stay of execution at the proper time.

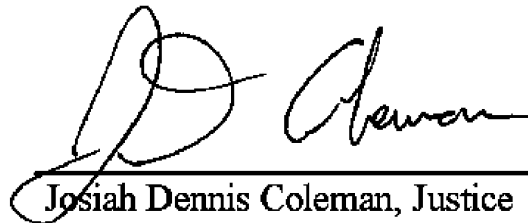
SO ORDERED.

AGREE: RANDOLPH, C.J., COLEMAN, MAXWELL, BEAM, CHAMBERLIN AND GRIFFIS, JJ.

DISAGREE: KITCHENS AND KING, P.JJ., AND ISHEE, J.

KITCHENS, P.J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY KING, P.J., AND ISHEE, J.

DIGITAL SIGNATURE
Order#: 242359
Sig Serial: 100005595
Org: SC
Date: 06/21/2022



Josiah Dennis Coleman, Justice

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2017-DR-00696-SCT

Stephen Elliot Powers

v.

State of Mississippi

**KITCHENS, PRESIDING JUSTICE, OBJECTING TO THE ORDER WITH
SEPARATE WRITTEN STATEMENT:**

¶1. The majority is “persuaded by the State’s argument that [Stephen Elliot] Powers has no right to competency in post-conviction proceedings.” I am unpersuaded. In prior cases, this Court has recognized a right to mental competency during post-conviction proceedings and remanded such cases for a hearing to determine a post-conviction petitioner’s mental competency to proceed. *Dickerson v. State*, 291 So. 3d 344, 347 (Miss. 2020); En Banc Order, *Goff v. State*, No. 2009-DR-01394-SCT (Miss. Dec. 15, 2011); En Banc Order, *Walker v. State*, No. 2005-DR-00788-SCT (Miss. Mar. 9, 2006). Indeed, this Court has preserved the right for more than two decades. *Neal v. State*, 687 So. 2d 1180, 1183 (Miss. 1996). *Neal* held that “a defendant must be competent at all stages of the criminal process, ‘whether trial, *Gammage v. State*, 510 So. 2d 802 (Miss. 1987); appeal, *Tarrants v. State*, 231 So. 2d 493 (Miss. 1970); post-conviction, *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir. 1985); or at the point of execution, *Billiot v. State*, 478 So. 2d 1043 (Miss. 1985), *cert. denied*, 475 U.S. 1098, 106 S. Ct. 1501, 89 L. Ed. 2d 901 (1986).” *Neal*, 687 So. 2d at 1183. Yet after the majority’s holding today, no right to mental competence will exist in Mississippi

during post-conviction proceedings, which occur after a direct appeal and prior to execution. In *Neal*, this Court held that defendants “must be competent at all stages of the criminal process[.]” *Neal*, 687 So. 2d 1183. For death-sentenced petitioners, “PCR proceedings are a critical stage of the death-penalty appeal process at the state level.” *Grayson v. State*, 118 So. 3d 118, 126 (Miss. 2013) (citing *Jackson v. State*, 732 So. 2d 187, 191 (Miss. 1999)). Why is it that, despite the fact that criminal defendants must be mentally competent at trial, during the direct appeal proceedings, and at execution, their competence is not required during post-conviction collateral proceedings designed to root out and attack any errors that may have occurred during pretrial, trial, and appellate proceedings?

¶2. The majority relies on a decision of the United States Supreme Court finding that the Sixth Amendment to the United States Constitution does not provide a right to mental competence during federal *habeas corpus* proceedings. *Ryan v. Gonzales*, 568 U.S. 57, 64-65, 133 S. Ct. 696, 184 L. Ed. 2d 528 (2013). But that case is inapplicable to the present case because these are not federal *habeas* proceedings. These are state post-conviction proceedings brought under the Mississippi Uniform Post-Conviction Collateral Relief Act. Miss. Code Ann. §§ 99-39 to-29 (Rev. 2020). A critical difference exists between federal *habeas* review of a state prisoner’s claims and a prisoner’s state post-conviction proceedings because “the federal court may review the claim based solely on the state-court record.” *Shinn v. Ramirez*, No. 20-1009, 2022 WL 1611786, at *7 (U.S. May 23, 2022) (citing *Cullen v. Pinholster*, 563 U.S. 170, 180, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)). Because intensive factual investigation of the petitioner’s claims must occur at the level of

state post-conviction proceedings, usually necessitating investigation outside the trial court record, the petitioner must be mentally competent and able to assist state post-conviction counsel in locating relevant information. After today’s decision, post-conviction counsel attempting to develop a complete and adequate state court record will face an impossible task. The holding is confounding in light of the fact that death-sentenced petitioners such as Powers have a state right to the effective assistance of post-conviction counsel. *Grayson*, 118 So. 3d at 126 (Miss. 2013) (citing *Jackson*, 732 So. 2d at 191.

¶3. The doctrine of *stare decisis* should prevent our abandonment of a right of this magnitude that has been in place for more than twenty years. As a reminder to all concerned, I reiterate the well-established rule that “[s]tare decisis [i]s the ‘doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.’” *Caves v. Yarbrough*, 991 So. 2d 142, 150 (Miss. 2008) (quoting Black’s Law Dictionary, 1173 (8th ed. 2004)). This Court has said that it will not depart from a prior decision without a determination that the decision was “pernicious,” “impractical,” or “mischievous in . . . effect, and resulting in detriment to the public.” *Id.* at 152 (quoting *Childress v. State*, 188 Miss. 573, 577, 195 So. 583 (1940)). The majority does not acknowledge the existence of the doctrine of *stare decisis*, let alone attempt to provide a reasoned explanation of why this Court should abandon its prior holding that a post-conviction petitioner has a right to be competent mentally during collateral proceedings that will determine his ultimate fate. For the reasons discussed above, it is the removal of the right to mental competence during post-conviction proceedings that appears pernicious,

impractical, and mischievous. Indeed, several of our sister states have recognized, to some degree, a due process right of mental competency in post-conviction proceedings. *Haraden v. State*, 32 A.3d 448, 452 (Me. 2011); *Reid v. State*, 197 S.W.3d 694, 702 (Tenn. 2006); *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1997); *People v. Owens*, 564 N.E.2d 1184, 1189 (Ill. 1990).

¶4. Powers has presented compelling evidence that he is not mentally competent to participate in legal proceedings concerning his conviction and sentence. During Powers’s incarceration, he has suffered multiple strokes. He has been diagnosed with a cerebral aneurysm. An examining physician has deemed Powers “seriously cognitively impaired” with “no signs of malingering.” Neuropsychological testing has confirmed his mental deficits, including vascular dementia. Powers’s attorneys have averred that his severe neurological defects have rendered him unable to discuss his case rationally with his attorneys. Powers lacks any memory of the crime or of the crime victim. Yet in the face of Powers’s strong claim of mental incompetency, the majority takes away his right to be mentally competent during post-conviction proceedings, forcing Powers’s counsel to advance his arguments in the total absence of any ability of his lawyers to communicate rationally with their client. The majority’s decision will foster the deplorable outcome of a mentally incompetent post-conviction petitioner proceeding through the justice system while completely incapable of communicating rationally with counsel. This Court in *Neal* and other cases has soundly rejected the prospect of such a nightmare. I object to the majority’s order in the strongest

terms. I would remand for a hearing to determine whether Powers is mentally competent to proceed with a motion for post-conviction relief.

KING, P.J., AND ISHEE, J., JOIN THIS SEPARATE WRITTEN STATEMENT.